



**STATE OF NEW HAMPSHIRE**  
**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

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Concord Police Supervisors Association

Petitioner

v.

City of Concord

Respondent

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Case No. P-0792

Decision No. 2007-150

**APPEARANCES**

Representing the Petitioner:

John S. Krupski, Esq., Cook & Molan, P.A.

Representing the City:

Paul F. Cavanaugh, Esq., City Solicitor

**BACKGROUND**

The Concord Police Supervisors Association (hereinafter "the Association") filed a Petition for Certification on March 1, 2007 requesting to create a bargaining unit comprised of the positions of Lieutenants and Sergeants employed by the City of Concord's Police Department (hereinafter "City"). In response, the City timely filed its objections and exceptions to the formation on the basis of a preclusive, and statutorily prohibited supervisory relationship between the two groups of ranking officers. The City requests that the petition be dismissed on that basis.

The PELB scheduled an evidentiary hearing on the matter to occur on April 18, 2007. On April 11, 2007 the parties filed a Joint Motion for Pre-hearing conference, stating that they believed it would allow the parties time to narrow the issues and possibly allow the parties to explore settlement options. Subsequently, the motion was granted on the basis of those representations as the PELRB does not usually schedule pre-hearing conferences on petitions for new certifications of bargaining units.

A pre-hearing conference was scheduled and was held before the undersigned Hearing Officer on June 8, 2007 at the PELRB offices, Concord, New Hampshire. Both parties were represented by counsel and participated in the discussion regarding this matter. Also at the conference, Union's counsel made an oral motion to add three additional positions to the original composition of the proposed bargaining unit, namely Dispatch Supervisor, Records Supervisor and Parking Manager. The City objected on the basis of a lack of community of interest and, relating specifically to the Records Supervisor the fact that the position was part of an existing bargaining unit represented by another exclusive bargaining representative. The Union withdrew the position of Records Supervisor from its motion to amend its petition. The parties agreed that the matter would go forward on the petition as amended, to include the Dispatch Supervisor and Parking Manager, and that with the addition of the two additional positions, the issues to be addressed focused on supervisory separation and community of interest of the new unit.

After some clarification of exhibits to be offered and the manner of sharing these, it was agreed that the matter would proceed to evidentiary hearing on June 20, 2007. On June 14, 2007 the City filed a Motion to Continue this hearing and the Association assented to same causing the evidentiary hearing to be rescheduled for August 22, 2007.

An evidentiary hearing was conducted before the undersigned hearing officer on August 22, 2007 at which both parties were represented, presented testimony and other evidence and had the opportunity to cross-examine witnesses. At the outset of the hearing, the parties submitted a Joint Witness and Exhibit List and an agreed Joint Statement of Facts that appears below as Findings of Fact #1-#13. The City also filed a Memorandum of Law in support of its exceptions to the Petitioner's proposed bargaining unit composition. The memorandum was accepted as filed. The parties also stipulated that the positions of Lieutenant and Sergeant shared the requisite community of interest referred to in RSA 273-A:8.

At the conclusion of the evidence, counsel for both parties requested leave to submit post-hearing memoranda of law in lieu of oral closings. Their request was granted and the record was held open to allow submissions until September 7, 2007 at which time it was closed.

After considering all filings and evidence presented by the parties and giving appropriate weight to all exhibits and testimonial credibility, the hearing officer finds as follows:

#### FINDINGS OF FACT

1. The City of Concord is a municipal corporation duly organized and existing under the laws of the State of New Hampshire.
2. The City of Concord is a "public employer" as that term is defined and used in RSA 273-A.
3. The Concord Police Supervisors Association is an employee organization within the meaning of RSA 273-A.

4. The Concord Police Supervisors Association seeks to represent certain employees of the City of Concord Police Department for purposes of collective bargaining pursuant to RSA 273-A.
5. On March 1, 2007 the Concord Police Supervisors Association filed with the Public Employee Labor relations Board a Petition for Certification of a unit composed of all full time lieutenants and sergeants of the City of Concord Police Department.
6. On June 8, 2007 at a pre-hearing conference, by agreement of the parties, the positions of Dispatch Supervisor and Parking Manager were added to the Petition for Certification.
7. The City of Concord and the Concord Police Supervisors Association agree that the employees covered by the Petition for Certification have no history of workable and acceptable collective negotiations.
8. The City of Concord and the Concord Police Supervisors Association agree that full time lieutenants and sergeants are employees with the same conditions of employment.
9. The City of Concord and the Concord Police Supervisors Association agree that full time lieutenants and sergeants are employees in the same historic craft or profession.
10. The City of Concord and the Concord Police Supervisors Association agree that full time lieutenants and sergeants function within the same organizational unit.
11. Full time lieutenants and sergeants are organized in the nature of a para-military organization with a very specific rank and chain of command structure.
12. Full time lieutenants and sergeants are sworn law enforcement officers.
13. Full time lieutenants and sergeants are required to carry firearms and participate in training and ongoing certifications that are unique to these employees as compared to the Parking Manager and Dispatch Supervisor.
14. The proposed membership of the petitioned for bargaining unit includes all fulltime police Lieutenants and Sergeants employed within the City, as well as the Dispatch Supervisor and the Parking Manager.
15. All proposed members of the bargaining unit are also considered members of the police Department for organizational and operational purposes. The Parking Manager oversees a budget, funds of which arise from a so-called "enterprise fund" that is distinguished from the regular tax revenue fund source that supports other operational functions of the police department.
16. It is operationally necessary that the sworn supervisors, *i.e.* Lieutenants and Sergeants, and the non-sworn supervisors, *i.e.* Dispatch Supervisor and Parking Manager, interact on

a regular basis with each other to assure that traffic control, accident response, critical incidents and towing of vehicles are appropriately addressed.

17. The sworn and non-sworn supervisors at issue relate to each other on a planning basis and, if necessary, on an issue involving the conduct of any employee under the direction of another unit, e.g. patrol, dispatch, parking.
18. The Dispatch Supervisor and Parking Manager are not required to carry weapons in the performance of their responsibilities and, as non-sworn employees, do not have special arrest powers.
19. The Dispatch Supervisor and the Watch Commander, which can be either a Lieutenant or Sergeant, interact with each other on issues related to information sharing, executing emergency plans and the performance of employees assigned to their section.
20. Within the police department organization the common usage of the category "first line supervisors" includes Lieutenants, Sergeants, Parking Manager and Dispatch Supervisor. Each performs some degree of supervision over other employees, participates at an initial level of the performance evaluation process of employees, and can issue only the most limited form of discipline, that being an oral reprimand.
21. All Proposed positions operate on a daily basis under personnel ordinances and departmental rules. (see Joint standard operating procedures adopted and promulgated by the City.)
22. Reference to the City's Personnel Rules and Regulations for all proposed members of the bargaining unit reveals that each position is obtained, in part, by written examination; all are subject to the same disciplinary process through appeal to the personnel advisory board; all are subject to the same severance pay formula, covered under the same Classification Plan, receive step increases and are, when appropriate, able to receive merit increases.
23. All petitioned for positions similarly are covered by a single personnel plan that covers annual leave, injury leave, health insurance and essentially all terms and conditions of work.
24. All petitioned for positions operate from the same geographic work location.
25. The several positions proposed for membership do receive different rates of compensation and all work approximately forty hours per week, albeit some schedules of police Lieutenants and Sergeants differ from the Dispatch Supervisor and the Parking Manager.
26. Lieutenants, and sometimes Sergeants, when acting as "Watch Commander" are involved in the operation of dispatch services as the Dispatch Supervisor is not always on duty and they would also assume supervision in an emergency situation.

27. In addition to the Dispatch Supervisor, Lieutenants and Sergeants both are responsible to monitor radio traffic emanating from the dispatch center.
28. The Parking Manager and the Lieutenant positions each are graded at level #13 while the Sergeant position is at level #11 and the Dispatch Supervisor at level #8.
29. The Parking Manager has been designated as an exempt employee, under the provisions of the federal "Fair Labor Standards Act". Having been designated as such, that position is not entitled to overtime. All other proposed positions are classified as hourly employees.
30. The Parking Manager is scheduled to normally work Monday – Friday from 9:00 AM to 5:00PM as are several other proposed members of the bargaining unit, particularly investigators.
31. The Parking Manager performs functions previously performed by Sergeants.
32. The Parking Manager reports directly to the Police Chief while the Lieutenants, and Sergeants when performing the functions of a Lieutenant, report directly to their respective division Majors.
33. Although reporting directly to the Police Chief, the Parking Manager is not designated as a member of the "command staff" which is comprised solely of the other two division heads, i.e. Majors, who also report directly to the Police Chief.
34. The Dispatch Supervisor reports to the Major responsible for the Patrol Services Division.
35. The Parking Control Division is one of three operational divisions comprising the City's Police Department.
36. All step increases to wages are made upon the recommendation of the [Police Chief]. See Joint Exhibit #4, "Chapter 34 of the City of Concord Ordinances: Personnel Rules & Regulations", §34-4-6.
37. Lieutenant Paul Ledger provided uncontraverted testimony that all of the proposed positions for membership in the bargaining maintained a self felt community of interest being employees of the police department.
38. Robert C. Barry is presently performing in the position of "Acting Chief". His previous assignment was on the command staff as a Major responsible for the Support Services Division. In addition to being the Acting Chief at the time of his testimony, he is also a candidate for permanent appointment to that position and, if he were to be invited to participate in an oral interview, it is likely that the Personnel Director, also present at the hearing, would be an interviewer.

39. In the main, Acting Chief Barry felt Lt. Ledger "did a fairly nice job" of testifying as to the operation of the chain of command, the nature of the discipline that could be dispensed by the Lieutenants and the Sergeants, and the relationship of the Dispatch Supervisor with the Sergeants and Lieutenants.
40. The Lieutenants' authority to discipline Sergeants consists of the delivery of an oral reprimand only. More serious disciplinary measures are considered and issued by more superior officers, *e.g.* command officers.
41. Any conduct that may become the subject of more serious discipline is first documented by the lieutenant filling out a formatted incident report and then passed up the chain of command as information upon which any discipline, if necessary, will be issued by a superior officer. The incident form does not solicit or make provision for a written recommendation for discipline of a Sergeant by a Lieutenant (See Joint Exhibit #10, General Order #26-3, page 16)
42. Any discipline, beyond an oral reprimand, is issued by persons higher in rank or position than Lieutenant within the organizational chart, *i.e.* Majors and Chief, and, in the case of long-term suspension or termination, only by the City Manager.
43. The Police Chief has discretion to assign weight to a recommendation of a Lieutenant in granting annual merit raises based upon an evaluation of a Sergeant and Lt. Ledger testified that he imagined that his recommendation was followed.
44. Step increases and annual merit increases are made by the Police Chief. Annual merit increases represent the equivalent of a step increase to an individual that has reached the top step of the wage scale. Extra Merit Bonuses, if made, are done so by the City Manager, however in the 2007 "Performance Evaluation Guidelines" this type of bonus is rendered essentially meaningless as the Director of Personnel has directed that due to a lack of funds, "no Extra Merit Bonus recommendations should be made at this time." Joint Exhibit #7, p.5 of 6.
45. While Lieutenants generally serve as Watch Commanders, Sergeants also serve in that capacity in various scenarios involving shortages due to scheduling, vacations, sick leave and other leave situations.
46. According to the personnel rules, only the Command Staff dispense substantial disciplinary measures over Sergeants.
47. Discipline in the form of termination or in the form of long-term suspension is made by the City Manager. Other forms of termination above an oral reprimand are made by the Police Chief.
48. The City of Concord "Class Specification" describing the essential job responsibilities of a Lieutenant is dated "12/98" and appears to express a level of discipline to Lieutenants

that does not reflect the present practice within the police department in that it indicates that a Lieutenant's disciplinary authority includes "recommending written reprimands or suspensions." Both witnesses testified credibly that the Lieutenant's authority to discipline is limited to oral reprimands.

49. The City of Concord "Class Specification" describing the "job Summary" for a Lieutenant includes the responsibility to "evaluate[s] the performance of subordinates." That responsibility is apparently limited to the completion of a prescribed form that includes instructions to check off a box or place a number in a box. See Joint Exhibit #7, p.2-4 of 6.
50. The hierarchy of evaluation within the City's Police Department provides that an evaluation conducted by a Lieutenant of a Sergeant is reviewed by a Major and then the Chief, followed by routing to the Personnel Office. If there are any non-automatic step increases in pay granted, they are done so on the authority of the Police Chief.
51. More of what might be characterized as supervisory responsibilities undertaken by Lieutenants and assigned to them pursuant to their job description are of an administrative nature.
52. There is no evidence that the additional job descriptions contained within a consultant's report submitted in 2006, Joint Exhibit #9, have ever had any operational effect and do not affect the determinations undertaken in this decision.

## DECISION AND ORDER

### JURISDICTION

The legislative mandate of the Public Employee Labor Relations Board includes determining the composition of individual bargaining units. RSA 273-A:8 charges the PELRB with responsibility for deciding whether a proposed bargaining unit of selected public employees is appropriate for certification, and, if so, the composition of that bargaining unit. That determination of the composition of each bargaining unit is to be reviewed on its own circumstances on a case by case basis. Appeal of Town of Newport, 140 N.H. 343, 352 (1995). The circumstances presented through testimony and documents are to be examined considering both statutory and regulatory criteria, see RSA 273-A:8 I and Pub 302.02. The ultimate question is whether there is a sufficient community of interest among the bargaining unit positions so that it is reasonable for them to negotiate together. *Id.* citing Appeal of the University System of New Hampshire, 120 N.H. 853 at 855 (1980).

In the instant matter involves not only the determination of whether such a community of interest exists, but also calls upon the Hearing Officer to examine the relationship between Lieutenants and Sergeants and determine if the type of supervisory authority exercised by

Lieutenants over Sergeants involves the "significant exercise of discretion" in matters that would adversely affect labor relations by creating conflict of a nature as to interrupt the delivery of services to the public. See RSA 273-A:8,II and Statement of purpose for RSA 273-A, Chapter 490 Session Laws 1975.

## DISCUSSION

The issue of whether or not the positions included in the Petition for Certification share a community of interest has been narrowed by the parties' agreement that Police Lieutenants and Police Sergeants share the requisite community of interest and I specifically find that such a community of interest exists based upon the evidence submitted at hearing and the criteria set forth in RSA 273-A:8, I and Pub 302.02.

The City objects to the extension of this community of interest to include the Dispatch Supervisor and the Parking Manager. Some criteria relevant to the determination of the existence of a community of interest include whether employees have the same conditions of employment, have a history of workable and acceptable collective negotiations, are in the same historic craft or profession, and function in the same organizational unit. RSA 273-A:8, I (a-d). Additionally, pursuant to Pub 302.02, the PELRB is also considers the geographic location of the proposed unit as well as the presence of common work rules, personnel practices, salary and fringe benefit structures, and the self-felt community of interest of employees as further evidence of a community of interest. The PELRB is not limited to solely these criteria and the court has recognized this stating that "... the statutory and regulatory frame-work which guides PELRB decisions is flexible, and gives much discretion to the PELRB expertise. The statute and regulation require only that certain factors may be considered in determining whether a community of interest exists..." Appeal of University System of New Hampshire V. PELRB, 131 NH 368, 553 (1988).

The individuals holding the positions of Dispatch Supervisor and Parking Manager are both employed by the City, albeit the Parking Manager's compensation is paid from a separate enterprise fund established by the City. However the source of compensation by which one employee is paid does not alter the public employer and public employee relationship for purposes of this representation case. Like the Police Lieutenants and Police Sergeants, both the Dispatch Supervisor and Parking Manager positions are also organizationally placed within the City's Police Department and therefore function in the same organizational unit.

There are many circumstances that may be referred to as conditions of employment. In the context of labor relations conditions of employment include, but are not limited to, such items as: employer entity, compensation schedules; step increases; merit increases; hiring, disciplinary and termination procedures; grievance or appeal procedures; annual leave provisions; sick leave provisions; and health insurance coverage. The Dispatch Supervisor and the Parking Manager positions share these conditions of employment with the Police Lieutenants and Police Sergeants.

While the specific job positions for these two positions differ from the positions of Police Lieutenant and Police Sergeant in a few respects, e.g. lack of arrest powers, these two positions



interact on a regular basis with Police Lieutenants and Police Sergeants to coordinate functions and to cooperate in the delivery of traffic and safety services to the public. Acting- Police Chief Barry further provided through testimony that in emergency situations the Lieutenant or Sergeant, if acting as Watch Commander, would assume supervision of the police dispatchers.

It is true that neither the Dispatch Supervisor nor the Parking Manager is a sworn officer who holds powers of arrest and carries firearms. It is true that the Parking Manager is the only position that has been classified by the City as a so-called "exempt" employee under the provisions of the federal Fair Labor Standards Act. It is true that these two positions normally work hours that are not the same as those worked by the Police Lieutenants and Police Sergeants because the latter two classifications are assigned in a manner to provide coverage 24/7 whereas these two positions are generally scheduled to a single daytime shift. While these are features not shared by the Police Lieutenants and the Police Sergeants, they do not collectively rise to a level sufficient to rupture the community of interest otherwise established by the evidence. I find that all proposed positions share a community of interest sufficient to allow them to populate a single employee association.

Having reached that conclusion, the remaining issue in this representation case requires an examination of the relationship between the Police Lieutenants and the Police Sergeants. The burden of proof also shifts from the Association, now having established a community of interest among all positions for which it has petitioned, to the City to prove its objections or exceptions based upon the requisite degree of supervisory authority residing with the Lieutenants. Since its creation the PELRB has retained the primary authority to define and interpret the term "supervisory" in the context of collective bargaining. *Department of Revenue Administration v. Public Employee Labor Relations Board*, 117 N. H. 976 (1977); *Appeal of the City of Concord* 123 N. H. 256 (1983). When the PELRB is asked to examine exclusions based upon a supervisory relationship, it is guided, in part, by the standard expressed by the court in *Appeal of East Derry Fire Precinct*, 137 NH 607, 611 (1993) which provides that "A supervisory relationship exists when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion." Further guidance provided by the court indicates that the PELRB should consider the employee's authority to evaluate other employees, the employee's supervisory role, and the employee's disciplinary authority as well as other factors. *Ibid.* at 610. It is relevant to these proceedings to note that in considering the nature and effect of evaluations in the East Derry Fire Precinct case cited above, the Supreme Court again spoke to evaluations whose purposes had implications on hiring and termination decisions and found that fire officers had "disciplinary authority." Such is not the case here because there is little evidence that a Lieutenant's evaluation were ever used for, or intended to be used for, disciplinary purposes, inclusive of hiring and terminations.

It is accurate to characterize the City's police department as a para-military organization with specific rank assignments and a chain of command structure. All of its Lieutenants and Sergeants are expected, and it appears do, perform pursuant to direction found in many departmental standard operating procedures. See Joint Exhibit #2. Adherence to professional norms associated with policing is undertaken by the individual employee who receives sufficient training related to police operation and conduct. A Lieutenant's superior rank position to a

Sergeant in this regard is more one of monitoring the application by the Sergeant of professional standards to be implemented by non-ranking police officers.

Regarding a Lieutenant's supervisory authority as applied to discipline, all evidence supports the determination that only minimal authority to discipline is assigned to Lieutenants. Lieutenants are limited to issuing an oral reprimand, the lowest form of discipline recognized in the personnel rules. A Lieutenant can file an incident report regarding a Sergeant's action. This is a formatted document passed up the chain of command as information upon which any discipline, if necessary, will be issued by an officer superior to the Lieutenant. These superior officers are referred to as the "command staff" which is comprised of the Chief and Police Majors. The Lieutenant is further removed from the issuance of discipline in a circumstance that would subject a Sergeant to the more severe discipline of long-term suspension and termination as that decision is made three levels of supervision above the Lieutenant by the City Manager.

The City's "Class Specification" that describes the "Job Summary" for a Lieutenant makes reference to the responsibility to "evaluate the performance of subordinates." However, when this reference is considered in light of the prescribed form that includes instructions to either check off a box or place a number in a box the latitude left to the Lieutenant or the discretion reserved to the Lieutenant to undertake such an evaluation does not appear to indicate that such a supervisory responsibility allows, much less requires, the significant exercise of discretion. In addition, there is insufficient evidence that the annual evaluation undertaken by a Lieutenant affects hiring or termination decisions. The hierarchical path of an evaluation within the City's Police Department provides that an evaluation conducted by a Lieutenant of a Police Sergeant is reviewed by a Police Major and then the Police Chief. The City's personnel rules provide that all step increases to wages are made upon the recommendation of the [Police Chief]. See Joint Exhibit #4, Section 34-4-6.

If there are any non-automatic step increases in wages granted, they are done so on the authority of the Police Chief. The personnel rules provide that step increases and annual merit increases are made by the Police Chief. Annual merit increases represent the equivalent of a step increase to an individual that has reached the top step of the wage scale. The "Extra Merit Bonuses", if made, are done so by the City Manager. Even this potential wage increase is unaffected by a Police Lieutenant at the present time because this type of bonus is rendered essentially meaningless as the Director of Personnel has directed that due to lack of funds, "no Extra Merit Bonus recommendations should be made." See Joint Exhibit #7, p.5 of 6. The weight of these factors related to the connection of the evaluation to a pay raise and the number of intermediary steps between the initial evaluation and the granting authority diminish the fact that a Police Lieutenant's evaluative recommendation has been given weight by the Police Chief, albeit a discretionary act by the Police Chief.

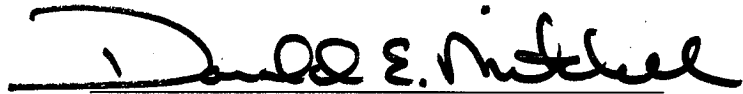
There is little discretion left to the Police Lieutenants in scheduling the hours of work for Sergeants as the testimony established that for the most part the Police Lieutenants are "paired" with Police Sergeants. Notwithstanding that Police Lieutenants are most often referred to as holding the position of "watch commander", Police Sergeants also serve in the position as "watch commander" and otherwise a Police Sergeant is "paired" with a Police Lieutenant to cover a shift. The fact is also that the requirements of providing police service within the City

around the clock, every day of the year, across at least three shifts, leaves little discretion to a Police Lieutenant to assign or reassign Police Sergeants to other shifts. While recognizing that it is possible that Police Sergeants may "swap" shifts from time to time and that the "swap" may require approval of a Police Lieutenant, that responsibility would not demonstrate an example of supervisory authority requiring a significant exercise of discretion.

The underlying purpose of segregating employees that are superior in position from subordinate employees for purposes of labor relations requires an elevated and specific supervisory relationship to exist between the two. I do not find that there is evidence in this case sufficient to demonstrate that the supervision exercised by the Police Lieutenants in relationship to the Police Sergeants rises to a level constituting the significant exercise of discretion. The petition is therefore granted resulting in the formation of a bargaining unit comprised of: all Police Lieutenants, Police Sergeants, Dispatch Supervisors, and Parking Managers of the City of Concord Police Department.

So ordered.

Signed this 30th day of October, 2007.

A handwritten signature in black ink, reading "Donald E. Mitchell". The signature is written in a cursive style with a large, sweeping initial "D".

Donald E. Mitchell, Esq.  
Hearing Officer

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